Supreme Court, U.S.
FILED
OCT 11 2000
CLERK

(4)

No. 00-214

IN THE

Supreme Court of the United States

QWEST CORPORATION, INC.,
Petitioner,

v.

MCI WORLDCOM NETWORK SERVICES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Network Services, Inc. states as follows:

On May 7, 1999, MCI Telecommunications Corporation changed its name to MCI WORLDCOM Network Services, Inc. MCImetro Access Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc. MCI WORLDCOM Network Services, Inc., is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom stock.

AT&T provides telecommunications, cable and other services. AT&T has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

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BRIEF IN OPPOSITION

Respondents MCI WORLDCOM Network Services, Inc. and MCImetro Access Transmission Services, Inc. (collectively, "MCI"), and AT&T Corp. ("AT&T") submit this brief in opposition to the petition for a writ of certiorari filed by U S West.[1]

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[1] Although U S West has been renamed Qwest as the result of a merger, Respondents will use the name U S West in this opposition to be consistent with the decisions below and with U S West's petition.

U S West's petition should be denied for three reasons. First, U S West's challenge to the Ninth Circuit's ruling concerning combinations of unbundled elements does not warrant certiorari. Indeed, it presents a highly idiosyncratic issue that, to Respondents' knowledge, has not occurred before and is highly unlikely to occur again: whether a court of appeals in one circuit violates the Hobbs Act[2] when it follows the reasoning of an intervening Supreme Court decision and interprets a statute differently than did a Hobbs Act court in another circuit.

In any event, it plainly was correct – and not a violation of the Hobbs Act – for the Ninth Circuit to follow this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*AT&T*"), rather than the Eighth Circuit's decision in that same case. The Ninth Circuit's decision did not intrude on the Eighth Circuit's Hobbs Act authority because the Ninth Circuit did not rule on the validity of subsections (c) through (f) and thus did not limit the Eighth Circuit's exclusive authority to review those rules. In addition, the Hobbs Act does not give the Eighth Circuit exclusive authority to interpret the underlying statute, and accordingly the Ninth Circuit's conflicting construction of 47 U.S.C. § 251(c)(3) does not implicate the Hobbs Act.[3]

This case also is not an appropriate vehicle for this Court to resolve the separate question of whether § 251(c)(3) of

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[2] 28 U.S.C. § 2342 *et. seq.*

[3] This Court only recently declined a request by U S West to review a very similar Ninth Circuit decision on virtually identical grounds. *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000), *reh'g denied*, No. 99-1641, 2000 WL 1210656 (U.S. Aug. 28, 2000).

the Telecommunications Act of 1996 ("the 1996 Act" or "the Act")[4] forecloses unbundling requirements such as the one imposed by the state commission in this case. Although the Eighth and Ninth Circuits have construed the Act differently, and there is a conflict on the construction of § 251(c)(3), U S West did not present that underlying question of statutory interpretation in its petition for certiorari. Even if the issue had been properly presented to this Court, the same issue was presented in the petition for certiorari on the Eighth Circuit's remand decision,[5] which has already been filed with this Court and is a better vehicle for addressing the issue.[6]

Second, U S West's challenge to the Ninth Circuit's collocation decision is also unworthy of this Court's review. The FCC currently is reconsidering its collocation standards, and it will soon issue regulations affecting the collocation provision at issue here. Those regulations will then be subject to judicial review. If the FCC promulgates its regulations before this Court's decision, the issue here could become moot. Alternately, if the FCC issues its regulations shortly after this Court rules, this Court's decision could be almost immediately superseded by those regulations. Either way, the fact that there will soon be new federal rules on this precise subject sharply diminishes any continuing importance of the Ninth Circuit's decision.

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[4] Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*).

[5] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000).

[6] *See* Petition for a Writ of Certiorari, *WorldCom, Inc. v. Verizon Communications, Inc. et al.*, (U.S. filed Oct. 10, 2000) (Resp. App. 3a). AT&T likewise intends to file a petition for certiorari in the same case raising this issue, among others.

Moreover, this issue does not warrant certiorari because the Ninth Circuit's decision did not create a circuit split. The D.C. Circuit, sitting as the Hobbs Act court, vacated the FCC rules and remanded them, directing the FCC either to reverse them or to provide a better explanation. The Ninth Circuit did not disagree with that conclusion, and even indicated that it "might agree." Pet. App. 10a, 20a. It did not need to decide that point, however, because this case presented a distinct issue – whether the 1996 Act prohibited the state commission from directing the collocation of a particular type of equipment, remote switching units ("RSUs").[7] Indeed, the FCC's forthcoming rules on collocation may well require incumbents to permit the collocation of RSUs, and many parties to that FCC proceeding are urging the Commission to do precisely that in response to the D.C. Circuit's remand.

Finally, this Court should deny certiorari on U S West's third question presented, which purports to address the appropriate "standard of review." This is not a separate question, but is merely an additional argument in support of U S West's first two points. Moreover, this supplemental argument is simply a straightforward issue of statutory interpretation on which no circuit conflict exists. U S West's narrow reading of the Act's requirement that federal courts determine whether arbitrated provisions "meet the requirements of" the Act conflicts with the plain language and with the purpose of the Act and its implementing regulations, as well as the few cases in which courts have addressed the issue.

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[7] Remote switching units are a type of equipment used primarily for interconnection with an incumbent's network. RSUs route telecommunications traffic from the incumbent's network to the new entrant's main switch, and may perform limited switching functions.

STATEMENT OF THE CASE

A. The Telecommunications Act of 1996

The 1996 Act was enacted to end the "longstanding regime of state-sanctioned monopolies" that has prevailed in markets for local telephone service across the country for almost a century, *AT&T*, 525 U.S. at 371, and to replace it with a vibrant competitive market that will bring lower prices and better service to consumers "as quickly as possible." H.R. Rep. No. 104-204, at 89 (1995). Because local telephone markets were traditionally controlled by incumbent monopolists such as U S West – which own the facilities necessary to provide local phone service – the Act imposes a number of duties upon incumbents to ensure the advent of competition in the local telephone market. As this Court recognized, "[f]oremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors." *AT&T*, 525 U.S. at 371. Specifically, incumbents must allow new competitors to: (i) "interconnect" their network facilities with those of the incumbent so that customers can call and be called by the incumbent's customers; (ii) lease unbundled elements of the existing network; and (iii) purchase and resell the incumbent's service. 47 U.S.C. § 251(c)(2), (3), (4).

1. The 1996 Act's Leasing Provisions and the FCC's Combinations Rules

Section 251(c)(3) requires an incumbent carrier to provide access to its network elements "in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service." 47 U.S.C. § 251(c)(3). The FCC concluded that this language requires incumbent carriers to provide unbundled network elements in combined

form when new entrants so request. *See* 47 C.F.R. § 51.315; *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, ¶¶ 293-297 (1996) ("*Local Competition Order*"). FCC Rule 315(b) thus mandates that incumbent carriers lease combinations of unbundled elements that generally exist in the incumbent's network. Subsections (c) through (f) of the Rule require incumbents to combine elements for a requesting new entrant, and to combine the incumbent's elements with those of the new entrant.

Upon its release in August 1996, the Local Competition Order was subject to numerous challenges brought under the Hobbs Act, 28 U.S.C. § 2342. These challenges were consolidated for review in the Eighth Circuit, which invalidated Rules 315(b)-(f). *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) ("*Iowa Utils. Bd. I*"), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Eighth Circuit concluded that § 251(c)(3)'s statement that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," 47 U.S.C. § 251(c)(3), "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd. I*, 120 F.3d at 813. Thus, the Eighth Circuit concluded, "unbundled" can only mean physically separated. 120 F.3d at 813.

This Court reversed, explicitly rejecting the Eighth Circuit's conclusion that § 251(c)(3) allows the leasing only of "discrete pieces" of network elements. *AT&T*, 525 U.S. at 393-95. The Court rejected the incumbents' argument that "unbundled" as used in § 251(c)(3) means physically separated

into pieces, emphasizing that § 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T*, 525 U.S. at 394. Because nothing in the Act itself precludes a requirement that incumbents lease network elements in combined form, and because the FCC's justification for imposing the combinations rule was reasonable, the Court upheld the FCC's requirement that incumbents provide access to existing combinations of network elements. *Id.* at 395.

Although it rejected the basis upon which the Eighth Circuit invalidated the FCC's combinations rules, this Court did not expressly rule on the validity of Rules 315(c)-(f). Accordingly, the Eighth Circuit considered on remand whether it should reinstate those subsections of Rule 315 in light of the Supreme Court's decision. *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) ("*Iowa Utils. Bd. II*"). Despite this Court's statement that the Act does not say "that elements must . . . never [be provided] in combined form," *AT&T*, 525 U.S. at 394, the Eighth Circuit again held, without addressing the Act's nondiscrimination requirements, that those rules should "remain vacated" because § 251(c)(3) indicates that new entrants are responsible for combining elements themselves. 219 F.3d at 758-59.

2. The 1996 Act's Collocation Provisions and FCC Collocation Rules

Section 251(c)(6) of the Act requires that incumbents "provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. . . ." 47 U.S.C. § 251(c)(6). Collocation is the means by which

new entrants interconnect their networks with that of the incumbent in order to exchange traffic with the incumbent and to gain access to unbundled elements of the local network. The FCC addressed the Act's collocation requirements in the *Local Competition Order*, concluding that the term "necessary," as used in § 251(c)(6), meant "used" or "useful." *See Local Competition Order* ¶ 579. The challenges to the Local Competition Order presented to the Eighth Circuit did not address the FCC's collocation requirements.

The FCC subsequently issued an order that clarified and strengthened the collocation requirements. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 F.C.C.R. 4761 (1999) ("*Collocation Order*"). The Commission concluded, *inter alia*, that incumbents must allow collocation "of any equipment that is 'used or useful' for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment." *Id.* ¶ 28; 47 C.F.R. § 51.323. Accordingly, incumbents must collocate RSUs and other equipment with multiple functionalities. *See Collocation Order* ¶¶ 28-29.

Several incumbents challenged the *Collocation Order* in the D.C. Circuit. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). They asserted that the FCC had adopted overly broad definitions of several terms, including "necessary," that the new requirements were not authorized by the Act, and that the collocation requirements imposed an unconstitutional taking. The D.C. Circuit rejected most of these claims, but concluded that in light of this Court's rejection of FCC Rule 319's use of a similar definition of

"necessary," *see AT&T*, 525 U.S. at 387-92,[8] the FCC must either revise its rules or provide a "better explanation" for its existing ones. 205 F.3d at 424. The FCC subsequently issued a Notice of Proposed Rulemaking in which it invited comment on the issues raised by the remand, including the proper treatment of RSUs and other varieties of telecommunications equipment. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC No. 00-297,¶ 74 (rel. Aug. 10, 2000) ("*Collocation NPRM*").

3. The 1996 Act's Procedures for Establishing the Terms of a New Entrant's Use of the Local Network

The Act establishes two different ways in which a new entrant and an incumbent carrier can reach an "interconnection agreement" – a contract that sets forth the terms and conditions under which the new entrant will have access to the incumbent's network. The first is negotiation: under § 252(a)(1), a new entrant may request that the incumbent carrier engage in negotiations to determine the terms and conditions by which the new entrant will lease network elements. 47 U.S.C. § 252(a)(1). The only constraints on negotiated terms are: (i) the term must not discriminate against a carrier not party to the agreement, and (ii) the term must be

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[8] In *AT&T*, this Court reviewed, *inter alia*, the FCC's implementation of 47 U.S.C. § 251(d)(2)'s requirement that "[i]n determining what network elements should be made available for purposes of [§ 251] (c)(3). . . , the Commission shall consider, at a minimum, whether – (A) access to such network elements as are proprietary is necessary . . . ." 525 U.S. at 387-88. The Court concluded that the FCC had not met its statutory obligation to give the "necessary" standard some substance. *See id.* at 387-92.

consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(a)(1); *id.* § 252(e)(2); *AT&T*, 525 U.S. at 372-73 (noting that an incumbent may "negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or (c)") (footnote omitted).

The second method is arbitration. After a fixed time, if the parties fail to agree on all terms and conditions of interconnection, they may submit the unresolved issues to a state utility commission for compulsory arbitration. 47 U.S.C. § 252(b)(1). Any arbitrated term must be consistent with all applicable terms of the 1996 Act, and all binding FCC regulations. *See* 47 U.S.C. § 252(c)(1); § 252(e)(2)(B).

Once the arbitration is completed, the arbitrated terms are combined with the negotiated terms in a final agreement which is submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). In reviewing the terms, the commission must determine whether each complies with the standards set out above – that is, whether the arbitrated terms comply with the 1996 Act and the FCC's regulations, and whether the negotiated terms are non-discriminatory and consistent with the public interest. 47 U.S.C. § 252(e)(2)(A); § 252(e)(2)(B). The state commission's final determination is subject to review in federal district court, which is charged with making the same inquiry. *See* 47 U.S.C. § 252(e)(6).

B. The Proceedings Below

1. -The MCI/U S West Interconnection Agreement

After months of negotiations with U S West, MCI filed a petition for compulsory arbitration of unresolved issues with

the Washington Utilities & Transportation Commission ("WUTC"), pursuant to § 252(b) of the 1996 Act. The WUTC conducted hearings and received written submissions from the parties over a period of several months, and on December 23, 1996, issued an order resolving most of the disputed issues and ordering the parties to submit a completed interconnection agreement. A WUTC-appointed mediator resolved remaining disputes as to certain other terms of the agreement. The WUTC approved the final MCI/U S West interconnection agreement pursuant to § 252(e)(2)(B) of the Act on August 18, 1997. The WUTC amended its order approving the agreement between MCI and U S West on August 27, 1997.

Both MCI and U S West filed complaints in the United States District Court for the Western District of Washington pursuant to § 252(e)(6) of the Act, challenging certain WUTC decisions as incorporated into the MCI/U S West Agreement. U S West there contested, *inter alia*, the WUTC's requirement that it combine unbundled network elements at MCI's request.[9] *See* Pet. App. 28a-29a. MCI argued, *inter alia*, that even if combinations were no longer required under federal law, the WUTC's interpretation of Washington law in a similar proceeding demonstrated that the combinations provision was still required in this case. MCI's Opposition to U S West's Motion for Summary Judgment, *MCI Telecommunications Corp. v. U S West Communications, Inc.*, No. C97-1508R, at 7-8 (filed April 14, 1998); *see In re the Petition for Arbitration*

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[9] The agreement provides: "U S West shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers." Agreement for Local Wireline Network Interconnection and Service Resale Between MCImetro Access Transmission Services, Inc. and U S West Communications, Inc., Attachment 3 ¶ 2.4 (Resp. App. 2a) ("MCI/U S West Agreement").

of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Incorporated Pursuant to 47 U.S.C. Section 252, Docket No. UT-960307, 1998 WL 223213 (WUTC March 16, 1998) (imposing combination requirement on incumbent GTE as a matter of state law) ("GTE Order"). *See also* Brief of the WUTC in Opposition to U S West Petition for Certiorari, *Qwest Corp., Inc. v. MCI WORLDCOM Network Services, Inc.* No. 00-214, at Part I.C., (U.S. filed Oct. 10, 2000). In addition, U S West asserted that the requirement that it allow MCI to collocate its RSUs at U S West facilities violated the Act.[10] *See* Pet. App. 32a-34a.[11]

The district court issued an order on July 21, 1998, resolving the parties' claims. The district court vacated the provision in the agreement requiring U S West to combine network elements for MCI. *See* Pet. App. 27a-29a. The court based its reversal on the Eighth Circuit opinion in *Iowa Utils. Bd. I*, 120 F.3d at 813, Pet. App. 28a-29a, vacating the FCC combinations rules. In addition, the district court rejected U S West's challenge to the interconnection agreement's requirement that U S West allow collocation of RSUs. It approved the WUTC's determination that remote switching units are "necessary for interconnection or access to unbundled network elements." Pet. App. 33a-34a.

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[10] The agreement provides: "MCIm may collocate transmission equipment (including Digital Cross Connect Systems and Remote Switching Units (RSUs) to terminate basic transmission facilities but MCIm shall not use physically collocated equipment to avoid payment of access charges." MCI/U S West Agreement ¶ 40.1.5 (Resp. App. 1a).

[11] The issues that MCI contested are not at issue here.

U S West and MCI timely appealed the district court's decision to the Ninth Circuit.

2. The AT&T/U S West Interconnection Agreement

AT&T commenced negotiations with U S West in March of 1996. Numerous issues were disputed, and the matter was referred to arbitration on July 25, 1996. The arbitrator issued a decision on December 9, 1996, and then modified it on January 16, 1997. On July 11, 1997, after further proceedings before the WUTC, the WUTC issued an order modifying the arbitrator's decision in part and approving the resulting interconnection agreement.

On August 11, 1997, U S West brought suit in the United States District Court pursuant to § 252(e)(6) of the Act, challenging sixteen aspects of the WUTC decision, including the network element combinations and RSU collocation issues it raises here. While the district court proceedings were pending, the WUTC issued a reconsideration order addressing GTE Corp.'s challenge to the combinations provisions contained in its arbitrated interconnection agreement with AT&T. In that order, the WUTC held that it had state law authority to order combinations of UNEs, and that an incumbent's failure to offer combinations would violate several provisions of Washington telecommunications law. *See* GTE Order. The WUTC and AT&T opposed U S West's motion for summary judgment by showing, *inter alia*, that the WUTC's network element combinations decision not only was correct as a matter of federal law, but also rested on the independent state law grounds identified in the GTE proceeding.

The district court issued its decision on July 21, 1998. The court vacated the network element combinations provision, holding that it violated federal law as construed by the Eighth Circuit in *Iowa Utils. Bd. I.* It further held that *Iowa Utils. Bd. I* likewise established that the separate state-law ground on which the WUTC had relied was preempted. *See* Pet. App. 60a. At the same time, the Court upheld the decision to require the collocation of RSUs, holding that it "was neither arbitrary nor capricious, was based on sufficient evidence, and was within the WUTC's discretion to decide." Pet. App. 66a.

The AT&T appeal was consolidated in the Ninth Circuit with MCI's appeal and a similar appeal arising out of the WUTC's arbitration of an interconnection agreement between Sprint Communications Co. ("Sprint") and U S West.

3. The Ninth Circuit Decisions

In a March 2, 2000, ruling, the Ninth Circuit reversed the district court's combinations decisions. It found that under this Court's interpretation of § 251(c)(3) of the 1996 Act in *AT&T*, the provisions requiring U S West to provide competing carriers with combinations of otherwise separate elements did not violate the Act, even if such a provision was no longer mandated by FCC regulations. Pet. App. 8a-9a, 20a, 23a. The Ninth Circuit also upheld the provisions requiring U S West to collocate remote switching units. Pet. App. 11a.

REASONS FOR DENYING THE WRIT

I. THE HOBBS ACT ISSUE IDENTIFIED BY U S WEST DOES NOT WARRANT REVIEW, AND THE CONFLICT U S WEST HAS IDENTIFIED RESPECTING § 251(C)(3) SHOULD NOT BE RESOLVED IN THIS CASE.

The first question presented in U S West's petition raises an issue involving the Hobbs Act[12] which is not worthy of this Court's review. Although there is a circuit conflict on the underlying question of the meaning of § 251(c)(3) of the 1996 Act, U S West does not raise that question here, and it is best addressed in another case.

A. This Case Does Not Raise Any Hobbs Act Concerns.

This case raises no Hobbs Act issue. The Ninth Circuit's decision does not usurp the Eighth Circuit's Hobbs Act jurisdiction because the Ninth Circuit did not purport to review the FCC's rule and certainly did not reinstate subsections (c) through (f). Nothing in the Ninth Circuit's decision limited the Eighth Circuit's ability to affirm its prior decision to strike down those subsections. Accordingly, the Ninth Circuit's

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[12] The Hobbs Act gives "[t]he court of appeals . . . exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. In addition, it provides that "[t]he court of appeals in which the record on review is filed. . . has exclusive jurisdiction to make and enter. . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." *Id.* § 2349.

decision did not disturb the Eighth Circuit's exclusive authority to "enjoin[], set[] aside, or suspend[]" the FCC's rules. *See* 28 U.S.C. § 2349(a).

Although the Ninth Circuit's understanding of the meaning of the Act differs from that the Eighth Circuit announced in the remand proceedings, that divergence does not implicate the Hobbs Act. The Hobbs Act gives the Courts of Appeals exclusive jurisdiction to review all final orders of the FCC. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996). As the court in which the direct appeals of the FCC's *Local Competition Order* and related rules have been consolidated, *see* 28 U.S.C. § 2112(a)(3), there is no question that the Eighth Circuit is charged with assessing the validity of the FCC's regulations and entering any order "enjoining, setting aside, or suspending, in whole or in part," the agency's rules. 28 U.S.C. § 2349(a). However, no court has ever construed this language to mean that, because a Hobbs Act court engages in statutory construction in the process of "determining the validity of" a Commission order, *id.*, it thereby gains exclusive power to construe the underlying statute.[13] The Eighth Circuit surely did

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[13] The structure and legislative history of the Hobbs Act provide further confirmation that the Eighth Circuit's exclusive jurisdiction extends only to assessing the FCC's *Local Competition Order*, not to construing the statute behind it. The Hobbs Act is not structured to set up a quasi-Supreme Court with exclusive control over a particular area of federal law. Instead, it is designed to conserve judicial resources by ensuring that only one appellate court reviews the administrative record supporting the agency's decision and to guarantee that an agency order is not subject to continuous attack after a chosen court has evaluated its validity. *See, e.g*, S. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. No. 81-2122, at 3-4 (1950); S. Rep. No. 85-2129, at 2-5 (1958). In keeping with this purpose, the bulk of the Hobbs Act is devoted to the appropriate treatment of the administrative record, the

not become the sole interpreter of the 1996 Act simply because it happened to construe the statute when assessing the FCC's rule.[14]

B. U S West's Purported Hobbs Act Issue is too Narrow to Warrant Review.

Moreover, even if this Court finds that this case raises a Hobbs Act concern, the procedural setting of this case is highly idiosyncratic. This Court interpreted the 1996 Act in its review of FCC regulations, and the Ninth Circuit then analyzed that interpretation in assessing the meaning of the 1996 Act in a case not involving the regulations. Subsequently, the Hobbs Act court on remand considered the impact of the Supreme Court's decision on related FCC regulations. Thus, the question U S West seeks to have addressed is whether, in these unique circumstances, the earlier court of appeals opinion is somehow rendered invalid by the subsequent Hobbs Act court's decision. This issue necessarily arises only in cases in this complex procedural posture—cases that are rare, at best. Because the issue is so narrow, this Court should decline to review the purported Hobbs Act issue on this basis alone.

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agency, and its order; it makes no mention of the reviewing court's power with regard to the underlying statute itself. *See, e.g.*, 28 U.S.C. §§ 2344, 2346, 2347; *see also* S. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. No. 81-2122, at 3-4 (1950). To the contrary, it is well accepted that each Court of Appeals has the authority to construe statutes and need not follow the holdings of other Courts of Appeals construing the same statutes. Nothing in the Hobbs Act purports to disturb that principle.

[14] For this reason, U S West's suggestion that the Court simply grant certiorari to vacate and remand the Ninth Circuit's ruling with instructions to follow the Eighth Circuit's substantive ruling is unwarranted.

The issue is made even less suitable for review by virtue of the independent state law grounds supporting the WUTC's holding. As the WUTC explained to the district court in the AT&T case, even if it had misconstrued federal law, its decision on network element combinations would still be supported by the state law grounds it had identified in a parallel case involving GTE. *See* GTE Order. The Ninth Circuit did not need to address those state-law ground because of its holding on federal law, but those grounds independently justify the network element combinations requirement at issue here.

C. This Case is Not the Proper Vehicle to Address Conflicting Interpretations of § 251(c)(3).

Nor should certiorari be granted in this case to resolve the underlying question whether the text of § 251(c)(3) unambiguously forecloses the kinds of unbundling requirements upheld by the Ninth Circuit in this case. Although the Eighth and Ninth Circuits have reached conflicting results on that question, U S West did not present it in its petition for certiorari. *See Bill Johnson's Restaurant's, Inc. v. NLRB*, 461 U.S. 731, 737 n.4 (1983) (citing Sup. Ct. Rule 34.1(a)). And even if it were fairly encompassed within the question U S West did present, review in this case would still be unwarranted. A petition for certiorari in the Eighth Circuit's Hobbs Act remand case has been filed with this Court. *See* Resp. App. 3a. Among the issues presented in that petition is whether the Eighth Circuit erroneously invalidated subsections (c)-(f) of Rule 315, which required incumbent carriers to combine otherwise separated elements at a competitor's request. That is plainly the better vehicle for addressing the issue because it presents the issue in the context of the administrative rulemaking record on which the FCC

relied. Thus, U S West's petition on this issue should either be denied or held pending disposition of the petition in *Iowa Utils. Bd. II*. In no event, however, should it be granted.

II. THE NINTH CIRCUIT'S COLLOCATION DECISION PRESENTS NO ISSUE WORTHY OF THIS COURT'S REVIEW.

The second question presented in U S West's petition for certiorari is likewise unworthy of review. There is simply no reason to address the Ninth Circuit's interpretation of the 1996 Act's collocation requirements because the FCC is in the process of issuing new implementing regulations that will likely render that issue moot. In any event, the Ninth Circuit's ruling does not conflict with either the D.C. Circuit's decision in *GTE Services v. FCC* or this Court's previous ruling in *Iowa Utils. Bd. I*.

A. This Court Should Deny Certiorari Because the FCC Will Soon Issue Additional Collocation Regulations.

The imminent release of an FCC Order governing collocation strongly counsels against granting certiorari. The FCC is currently reevaluating the Collocation Order on remand from the D.C. Circuit. *See Collocation NPRM* ¶¶ 70-84. Specifically, the D.C. Circuit ordered the FCC either to revise its rules or to provide a better explanation for the existing ones. *See GTE*, 205 F.3d at 424. The FCC will also consider additional aspects of the collocation rules. *Collocation NPRM* ¶¶ 1-7. Initial comments in this proceeding are due on October 12, 2000. FCC Public Notice, *Common Carrier Bureau Extending Pleading Cycle*, CC Docket No. 98-147, DA 00-2036 (rel. Sept. 6, 2000). The resulting rules may well require

collocation of RSUs: many of the parties to the proceeding will be arguing for that result, which is perfectly consistent with the D.C. Circuit's decision.

The FCC's consideration of this matter will probably conclude before this Court would begin to review U S West's petition, and the FCC will likely issue new collocation regulations before this Court could rule in this case. Once issued, those rules will govern in any court or commission proceeding involving challenges to collocation requirements within the scope of the regulations. Because the new FCC rules will address the terms of collocation challenged by U S West in this case, this Court's decision could be quickly superceded by FCC regulations. That is so whether or not this Court grants U S West's petition: if the Court grants certiorari and the FCC rule issues, the Court will likely remand to the WUTC for reconsideration in light of the new rules; if this Court denies certiorari, one of the parties will likely request the WUTC to review the agreement for compliance with the new rules.[15] Thus, review of the collocation issue is unwarranted.

B. The Ninth Circuit's Holding Does Not Conflict With Either the D.C. Circuit or This Court's Precedent.

U S West's petition for certiorari significantly overstates the degree of overlap between the Ninth Circuit opinion and the rulings of the D.C. Circuit in *GTE* and this Court in *AT&T*. In *GTE* and *AT&T*, the courts interpreted the 1996 Act in the context of determining the validity of FCC implementing

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[15] Because there will be a binding FCC regulation in place, the WUTC would be required to follow the FCC rule, and not the Ninth Circuit's interpretation of the Act.

regulations. In *GTE*, the D.C. Circuit addressed a direct challenge to the FCC's Collocation Order. The court concluded that the FCC's definition of "necessary" as "used or useful" should either be revised or "better expla[ined]." *GTE*, 205 F.3d at 422-24. In *AT&T*, this Court reviewed the consolidated Eighth Circuit challenges to several FCC rules, none of which involved collocation, and concluded that in the context of determining access to unbundled network elements, Rule 319's definition of the "necessary" standard did not satisfy § 251(d)(2). *See* 525 U.S. at 387-92.

The Ninth Circuit, on the other hand, did not purport to address the validity of the FCC's collocation rules, much less opine on the definition of "necessary" as used in those regulations. The court expressly rejected U S West's invitation to issue such a comprehensive ruling, and limited its review to determining whether the arbitrated collocation provisions were contrary to the 1996 Act's requirements. *See* Pet. App. 11a. Specifically, the court concluded that the provisions in the MCI and AT&T interconnection agreements requiring the collocation of RSUs did not violate the Act because the 1996 Act did not prohibit such requirements. *See* Pet. App. 11a, 20a. The Ninth Circuit did not rule on the FCC regulations, and indeed indicated that, were it doing so, it "might agree" with a statutory interpretation consistent with the D.C. Circuit's interpretation. *See* Pet. App. 10a, 20a. Accordingly, its opinion in no way intrudes on the D.C. Circuit's Hobbs Act authority or creates a circuit conflict. *See* Part I, *supra.*

The fact that courts have invalidated the FCC's previous definitions of necessary does not mean that the Ninth Circuit's affirmance of the WUTC ruling violated the 1996 Act. The D.C. Circuit did not hold that the 1996 Act expressly prohibits physical collocation requirements such as the one incorporated

into the MCI and AT&T interconnection agreements. Instead, the court held that the 1996 Act did not require that collocation be as extensive as that mandated by the FCC's *Collocation Order*, and remanded for further consideration. *See GTE*, 205 F.3d at 422-24. In *AT&T*, this Court also spoke in terms of what the 1996 Act affirmatively requires. The cases were silent on the independent legality of collocation requirements – focusing instead on the FCC's exercise of its rulemaking authority. Accordingly, neither case supports U S West's conclusion that the collocation provisions themselves are unlawful if included in an interconnection agreement, and the only courts to address the issue have disagreed with U S West's conclusion. *See Southwestern Bell v. Waller Creek Communications, Inc.*, 221 F.3d 812, 821 (5th Cir. 2000); *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 572-73 (7th Cir. 1999) ("*Illinois Bell v. WorldCom*").

U S West's additional assertion that the 1996 Act "provides for collocation *only* where it is 'necessary,'" Pet. at 17, and that any arbitrated requirement that arguably requires more than that violates the Act, assumes that the Act imposes an outer limit on the provisions a state commission may include in interconnection agreements. However, as set forth below, the 1996 Act is a floor, and not a ceiling, on the requirements that state commissions may impose. *See* Part III, *infra*; *Collocation Order* ¶ 23 (acknowledging state commissions' authority to impose additional requirements to further the pro-competitive goals of the Act). Thus, this issue is not worthy of this Court's review.

III. U S WEST'S "STANDARD OF REVIEW" ARGUMENT PRESENTS A SIMPLE QUESTION OF STATUTORY INTERPRETATION THAT DOES NOT WARRANT THIS COURT'S REVIEW.

U S West's third question, which purports to address the appropriate "standard of review," does not merit this Court's review. Indeed, it is not a separate question at all. Even on U S West's view, overturning the Ninth Circuit on this point would affect the result *only* on the two issues independently raised in the petition: (i) whether the Ninth Circuit erred in upholding the WUTC's combinations requirement, and (ii) whether the Ninth Circuit erred in upholding the WUTC's collocation requirement. Thus, the purported "standard of review" question is merely an additional argument in support of the other issues U S West has raised. As demonstrated, those questions do not warrant review. Nothing in U S West's third question presented changes that conclusion.

Moreover, this purported standard of review question presents nothing more than a straightforward issue of statutory interpretation on which no circuit conflict exists. U S West advocates a narrow interpretation of the 1996 Act's requirement that federal courts examine whether terms that state commissions impose during arbitration "meet the requirements of" the Act and its implementing regulations. *See* Pet. at 24; 47 U.S.C. § 252(e)(6). According to U S West, this provision means that state public utility commissions "may impose only those conditions that are *required* by federal standards," Pet. at 20 (emphasis added), and must require that incumbents take only those pro-competitive steps that the Act "*affirmatively mandate[s]*." Pet. at 24. If state commissions exceed this extremely limited authority, U S West contends, they violate the Act and basic principles of federal primacy.

All courts that have addressed the issue have adopted the contrary view: the fact that a provision is not affirmatively required by the Act or its implementing regulations does not necessarily mean that its inclusion violates, or is inconsistent with, the Act. *See Waller Creek*, 221 F.3d at 821; Pet. App. 11a; *Illinois Bell v. WorldCom*, 179 F.3d at 574. Neither the Eighth Circuit in *IUB* nor the D.C. Circuit in *GTE* addressed the question of whether the Act provides a floor but not a ceiling for state regulation; those courts' review solely concerned the validity of FCC regulations, and thus the courts did not pass on the legitimacy of imposing similar requirements in the absence of regulations.

In any event, U S West's position is plainly wrong. Such a restrictive view of the role of state commissions cannot be reconciled with the provisions of the Act in which Congress empowers state commissions to supplement the Act's requirements when setting terms of interconnection. *See, e.g.*, 47 U.S.C. §§ 251(d)(3), 261(c), & 252(e)(3). It also flatly contradicts the FCC's clear expectation that state commissions will go beyond the "*minimum obligations*" that FCC regulations provide. *Local Competition Order* ¶ 54 (emphasis added); *see id.* ¶¶ 58, 66, 180, 243; *see also Collocation Order* ¶ 23. Here, the WUTC can impose – and indeed has imposed -- requirements like the ones at issue in this case on the basis of state law. *See* Part I.B., *supra*. That fact alone renders the issues presented here unworthy of this Court's review.

In sum, U S West's narrow construction of state commission authority finds no support in the Act or its implementing regulations, and it conflicts with the practical reality of the arbitration process. Therefore the petition should be denied on this issue.

CONCLUSION

The petition for certiorari should be denied, or, at most, should be held pending disposition of the petition in *Iowa Utils. Bd. II.*

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October 10, 2000

APPENDIX

APPENDIX A

AGREEMENT FOR LOCAL WIRELINE NETWORK
INTERCONNECTION AND SERVICE RESALE
Between
MCImetro Access Transmission Services, Inc.
and
U S WEST Communications, Inc.

* * * *

40. Collocation

40.1 General Description

* * * *

40.1.5 MCIm may collocate transmission equipment (including Digital Cross Connect Systems and Remote Switching Unites (RSUs)) to terminate basic transmission facilities but MCIm shall not use physically collocated equipment to avoid payment of access charges. MCIm and U S WEST shall establish procedures, including an audit mechanism, that will demonstrate that MCIm is not using RSUs for the purpose of bypassing access charges.[7] MCIm must identify what equipment will be installed, to allow for U S WEST to use this information in engineering the power, floor loading, heat release, environmental participant level, and HVAC.

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[7]Staff Recommendations, dated August 11, 1997, pp. 2-3.

Attachment 3

UNBUNDLED ACCESS/ELEMENTS

* * * *

2. Unbundled Network Elements

* * * *

2.4 U S WEST shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit MCIm to provide Telecommunications Services to its subscribers. MCIm may purchase unbundled Network Elements without restriction as to how MCIm rebundles those elements.

* * * *

APPENDIX B

No.

IN THE

Supreme Court of the United States

WORLDCOM, INC.,

Petitioner,

v.

VERIZON COMMUNICATIONS, INC. *et al.*

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

* * * *

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II. THE EIGHTH CIRCUIT'S INVALIDATION OF §§ 51.315(C)-(F) OF THE FCC'S RULES CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT AND THIS COURT'S DECISION IN *AT&T v. IUB.*

This Court should also grant certiorari to review the Eighth Circuit's invalidation of 47 C.F.R. §§ 315(c)-(f), which require incumbents, upon request, to combine leased elements in their

network that are not already combined, or to combine leased elements in their network with the elements of new entrants.

1. The Eighth Circuit's decision is in direct and acknowledged conflict with two decisions of the Ninth Circuit. Pet. App. 21a-22a. While the Eighth Circuit was reconsidering its combinations decision on remand from this Court, the Ninth Circuit was called upon to assess the validity of an interconnection agreement arbitrated by the Washington state commission. That agreement included a requirement that, if requested by a new entrant, elements be provided in combination. Because the Eighth Circuit was reconsidering the validity of its rules, the Ninth Circuit assumed that sections (c)-(f) were not in force and that no FCC rule *mandated* "new" combinations. The Ninth Circuit thus turned to the question of whether the Act itself permits a state commission to impose such a requirement and concluded that, "under the rationale of *AT&T Corp.*," the provision was plainly valid. Citing this Court's holding in *AT&T* that nothing in the 1996 Act mandates that elements be provided only in separated form, the Ninth Circuit concluded that "[i]t . . . necessarily follows" that a provision requiring an incumbent to provide new combinations "does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts." *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000). The Ninth Circuit reiterated

this conclusion in a later case in which the same issue was presented, stating flatly that "the Eighth Circuit's interpretation of the Act was incorrect." 204 F.3d at 1268.

In the decision at issue here, the Eighth Circuit subsequently expressed its disagreement with the Ninth Circuit's analysis and reaffirmed its earlier decision that §§ 315(c)-(f) "violate the plain language of the statute" and, therefore, would remain vacated. Pet. App. 23a. Thus, as each of these courts acknowledges, there is a conflict between the Eighth and Ninth Circuits over the meaning of § 251(c)(3) of the Act.

2. The Eighth Circuit's invalidation of Rules 315(c)-(f) also conflicts directly with this Court's decision in *AT&T*. In *IUB*, the Eighth Circuit struck down Rules 315(b)-(f), on the basis that they conflicted with the Act's plain language. This Court reviewed only the invalidation of § 315(b) – which prohibits incumbents from separating network elements that are already combined – and reversed. In doing so, this Court rejected the argument that, in requiring the incumbent to provide network elements in a manner that "allows requesting carriers to combine" them, Congress contemplated the provisioning of elements *only* in physically separate pieces. Although the Act "assuredly contemplates that elements may be requested and provided in this form," this Court held, "it does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T*, 525 U.S. at 394. In short, "[t]he reality is that § 251(c)(3) is ambiguous," and, pursuant to *Chevron*, the FCC's reasonable combinations regulation must therefore be upheld. *Id.* at 395.

On remand, the Eighth Circuit directed the parties to brief whether this Court's decision affected the validity of §§ 315(c)-(f). *See Iowa Utils. Bd. v. FCC*, No. 96-3321, *et al.*, Order on Remand from the Supreme Court of the United States, ¶ 7a (8th Cir. filed June 10, 1999). Yet, without even acknowledging

this Court's decision, the Eighth Circuit once again invalidated the

rules "[u]nder the first prong of Chevron," reasoning that "Congress has directly spoken on the issue of who shall combine previously uncombined elements. It is the requesting carrier who shall 'combine such elements.'" Pet. App. 22a-23a. Thus, the Eighth Circuit concluded, the plain language of the Act prohibits any FCC rule other than one requiring incumbents to provide access to unbundled network elements *only* in separated fashion and never in combined form. *Id.* That decision cannot be reconciled with this Court's reading of § 251(c)(3).

3. The restoration of Rules 315(c)-(f) is important to ensure that new competitors are not "seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." *Local Competition Order* ¶ 293 (Pet. App. 40a-41a). In particular, the FCC noted that "in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents' network without the assistance of the incumbent." *Id.* Thus, the FCC concluded that as a practical matter, new entrants cannot simply take uncombined elements within the incumbent's network and combine them themselves. Absent a requirement that the incumbent do the combining, competitors could thus not use unbundled network elements – the most promising of the Act's mechanisms for developing competition – to provide local service.

The real-world consequences of the Eighth Circuit's invalidation of Rules 315(c)-(f) are even graver than the FCC

anticipated. Not only do new entrants lack the information necessary to enter an incumbent's facilities and combine elements, incumbents have flatly prohibited them from doing so. Thus, despite the Eighth Circuit's blithe assertion in *IUB*, 120 F.3d at 813, that "the fact that the incumbent LECs object to [the FCC's combinations] rule[s] indicates . . . that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them," incumbents

have repeatedly indicated that they would *not* allow new entrants to access their facilities in order to combine elements. In state arbitrations, for example, Southwestern Bell has asserted that the Texas Commission must deny such access because Southwestern Bell "has grave concerns regarding the implications of such an order on the security, integrity and reliability of its network; the quality of its service, and the privacy of its customers." Brief on Eighth Circuit Alternatives, *In re Petition of MFS*, Docket Nos. 16189 *et al.*, at 11 (Tex. Pub. Util. Comm'n filed Oct. 27, 1997). The former Bell Atlantic has similarly warned against allowing a new entrant's employees "with wire snips and screwdriver in hand, to work on" its equipment. Joint Brief of Interveners in Support of the FCC, *Iowa Utils. Bd. v. FCC*, No. 96-3321 at 59 (8th Cir. filed Aug. 16, 1999) (quoting Statement of Donald Albert ¶ 23). For its part, BellSouth has termed such access "an unwarranted and illegal intrusion." *Id.* (quoting Reply Affidavit of Alphonso Varner at 14); *see also id.* (citing Collaborative Process Rebuttal Affidavit of William Deere). Indeed, petitioner is unaware of a single instance in which an incumbent allowed competing carriers access to the incumbent's elements in order to combine them.

This issue has taken on even greater importance because incumbents are rapidly expanding the scope of what they claim are "new" combinations. Seizing on the Eighth Circuit's decision, the incumbents consistently assert that any instance in which they have to combine elements, whether physically or electronically, is a new combination that they do not have to provide. Thus, when a consumer orders a second line for internet use, for example, incumbents have asserted that attaching the loop from that house to the incumbent's switch constitutes a new combination that need not be provided to new entrants. And, as explained above, incumbents are refusing to allow new entrants into the incumbents' facilities to do the combining themselves. This leads to the anticompetitive result that, if a customer orders a second line, that customer must first

obtain service from the incumbent (which does the combining) and then switch providers.

In short, just as the expert agency predicted, Rules 315(c)-(f) offer the only practical means to ensure that new entrants are able to obtain the elements they lease in a manner that allows them to use those elements to provide local service. In light of the importance of these rules to new entrants' ability to compete in local markets, review is plainly warranted.